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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 442.

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama.

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ATLANTIC COAST LINE RAILROAD COMPANY,
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BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondent, Atlantic Coast Line Railroad Company, by its attorneys, respectfully requests and moves the Court that the Petition for a Writ of Certiorari to the Supreme Court of Alabama be dismissed or denied.

FOREWORD

The allegations of the Petition (Petition, pages 2, 8 [last sentence], 12, 16, 20-21) represent to this Court as material basis for action by it, that the Supreme Court of Alabama deviously connived at tampering with its own opinions and records. These imputations recklessly disregard and misrepresent record facts. We can only assume that Petitioner chose not to file with this Court certain portions of the Record of the Supreme Court of Alabama.

Accordingly, as provided by paragraph (6) of Rule 21 of this Court, Respondent has filed with the Clerk a duly certified copy of an additional portion of the record below, being page 44 of Docket 107 of the Supreme Court of Alabama. For convenience this document and its certification are photographically reproduced in the Appendix hereto (pages 29 to 33, inclusive). Suffice it here to say that regarding the rendition of the first opinion of the Supreme Court of Alabama, Atlantic Coast Line Railroad Co. v. Mildred S. Stinson, as Admx., as officially reported at 264 Alabama 522, 88 So. 2d 189, it shows, among other things, the following official record action:

> "November 23, 1954—Argued and Submitted.
>
> March 31, 1955—Reversed and Remanded.
>
> April 14, 1955—Application for Rehearing Filed by Appellee (Petitioner).
>
> April 14, 1955—Certificate of Recall Issued. Order, Stakely, J.
>
> April 20, 1955—Certificate and Opinion Returned Pursuant to Recall.
>
> * * * * * * *
>
> June 21, 1956—Application for Rehearing Overruled; No Opinion Written (Pages 7, 8, 10 and 11 rewritten to insert 'in whole or in part').

June 21, 1956—Certificate of Reversal and Copy of Opinion Returned to Clerk."

In absence of its availability to us, it is uncertain just what is the content of the record which Petitioner did file with the Clerk.[1] Respondent is therefore seriously handicapped in undertaking to answer accurately many of the statements of Petitioner. However, rather than burden the Court with a motion under paragraph (7) of Rule 21 that the record be printed in advance, we will undertake to answer as fully as we can with the material now available to us at this stage of the proceeding,[2] and as far as is contemplated or proper under paragraph (1) of Rule 24.

THE OPINION BELOW.

The opinion of the Supreme Court of Alabama, rendered June 20, 1957, upon entry of its judgment of that date affirming the judgment of the trial court in favor of Respondent, and which is the only judgment sought here to be reviewed (Petition, p. 2), is reported at ... Ala. ..., 96 So. 2d 305 (Adv. #3, August 15, 1957). That opinion, reproduced for convenience in the Appendix (pages 44 to 45) in pertinent part, states (p. 306 of 96 So. 2d):

"This court continues to hold that the affirmative charge was properly given, and that the judgment of the circuit court should be affirmed. For the sake of brevity, and to avoid the setting out of the original

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[1] The notice mailed to Respondent's counsel as required by the Rules describes it as "Certified copy of first trial and judgment of S. Ct. of Alabama. Certified copy of second trial and judgment of S. Ct. of Alabama."

[2] In doing so, references hereinafter made to the Record will be to pages of the record of the Trial Court as certified to the Supreme Court of Alabama on Petitioner's appeal from the judgment rendered November 13, 1956, in favor of Respondent and which judgment was affirmed June 20, 1957.

opinion verbatim, **we hereby adopt the opinion in Atlantic Coast Line Railroad Co. v. Stinson, 264 Ala. 522, 88 So. 2d 189, as our opinion in the instant case.**" (Emphasis added.)

The earlier published opinion there **adopted as theretofore published in 264 Ala. 522, 88 So. 2d 189,** is for convenience, reproduced in the Appendix (pages 34-43 et seq.).

The first opinion, released June 21, 1956, **had been published before the time of the second trial,** on November 13, 1956, was before the trial court in the trial (R. 31-32) and the opinion of the Supreme Court of Alabama **as so published** was applied by the trial court. Moreover, a full official certified copy of the final opinion had been in the trial court's file of this case since June 21, 1956 (Appendix, p. 29).

Notwithstanding the plain record facts, by such canted statements as "original opinion * * * filed March 31, 1955, and certified by the Clerk," "what **purports** to be the original opinion" in official reports, but which "contain curious and unexplained material differences from the certified copy furnished to counsel by the Court," etc., the Petition represents to this Court that the Supreme Court of Alabama and its Clerk have connived at tampering with the records. An imputation of some kind of fraud or deceit.

This notwithstanding the original manuscript opinion of March 31, 1955, and its accompanying certificate of reversal, **were recalled by that Court on Petitioner's application for rehearing** (Appendix, p. 29) in which **Petitioner expressly took exception to omission to use the phrase "in whole or in part"** (Petition, pp. 20-21) at various places in the original manuscript[3] and the **record**

[3] The recalled *manuscript opinion* itself showed no conceptual disregard either of the full scope of the Act or of the phrase "in whole or in part" for it expressly applied in summation of its hold-

docket entry of action on Petitioner's application for rehearing on June 21, 1956, shows the indicated manuscript pages then **rewritten by the Court** to insert, as applicable, the words "in whole or in part" (Appendix, p. 29 and certificate).

It is not the Supreme Court of Alabama who has practiced deceit.

JURISDICTION.

In the Petition (p. 2) jurisdiction of this Court is sought to be raised expressly and solely with regard to the judgment of the Supreme Court of Alabama entered June 20, 1957 (Petition, p. 2 and Appendix, p. 27a), which affirmed the judgment of the trial court in favor of Respondent. No other judgment or order of the Supreme Court of Alabama is set forth in the manner required by the statutes and the Rules of this Court.

Yet the averments and statements in the Petition show that neither the judgment of June 20, 1957, nor the judgment and mandate dated June 21, 1956, in express compliance with which the trial court entered judgment for Respondent (R. 31-32), are within the jurisdiction of this Court to review.

The Record and Petition expressly show that upon entry of the judgment and mandate of reversal on June 21, 1956, by the Supreme Court of Alabama, Petitioner was (R. 29),

> "unable to produce any testimony or evidence different from or in addition to the testimony and evidence produced, offered and admitted at the said trial of June 8, 1953, to June 12, 1953."

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ing (Petition, Appendix, p. 12a) the universally applicable doctrine "A party claiming under the Act must in some adequate way establish negligence *and it must appear that such negligence is the proximate cause, in whole or in part,* of the accident."

And the Petition also establishes (Petition, p. 4) that Petitioner thereupon

> "* * * had only a new trial **with no additional evidence** to offer. Petitioner returned to Jefferson County in November, 1956, and offered the previous record in evidence. **The trial court in obedience to the previous mandate of its Supreme Court directed a verdict for respondent.**" (Emphasis added.)

and further (Petition, p. 28):

> "**Petitioner, therefore, found herself in the intolerable situation of having no additional evidence and having to go through the artificiality of a new trial on precisely the same evidence, suffering a directed verdict and then taking an appeal, the result of which was a foregone conclusion.**" (Emphasis added.)

Upon this state of record facts, this Petition, filed September 9, 1957, properly presents no judgment or order within the jurisdiction of this Court to review. 28 U. S. C., Sec. 1257 (3); 28 U. S. C., Sec. 2101 (*c*).[4] It is too late.

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[4] Under such record circumstances, the order and mandate of the Supreme Court of Alabama of June 21, 1956, was final for the purposes of review by this Court, irrespective of whether it is ordinarily considered as "final" under local practice or however considered by counsel or parties. Pope v. Atlantic Coast Line Railroad Co., 345 U. S. 379, 97 L. ed. 1094; Rio Grande Western Ry. v. Stringham, 239 U. S. 44, 60 L. ed. 136; Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254; Market Street Railway Co. v. Railroad Commission of the State of California, 324 U. S. 548, 89 L. ed. 1171; Richfield Oil Corp. v. State Board (Cal.), 329 U. S. 69, 91 L. ed. 80 (87); cf. Cole v. Violette, 319 U. S. 581, 87 L. ed. 1599.

QUESTIONS PRESENTED.

The Petition and record raise only the following questions at this time:

(A) Whether the Petition should be dismissed because of failure to "present with accuracy" the essential record facts (par. [4] of Rule 23) and misrepresentation to the Court of the record facts and action of the Supreme Court of Alabama, and, if not,

(B) Whether, under the facts and circumstances established, and conceded by Petitioner, the Petition is either timely or adequate to present for review any order or judgment of the Court below within the jurisdictional requirements of the statutes [28 U. S. C., Sec. 1257 (3); 28 U. S. C., Sec. 2101 (c)] as applied by the decisions of this Court.

(NOTE: In this posture of the case, no question regarding the merits or the soundness of the judgment of the Supreme Court of Alabama in this case is timely. Par. [1] of Rule 24. If the Court should ultimately conclude that it has or will exercise jurisdiction to review this cause, then Respondent will perform its duty and expects to exercise its right under Rule 41 to file its brief on the merits, appropriately presenting and dealing with any questions on the merits of the cause which may arise on the record then properly established and available as provided by Rules 26 and 36.)

STATEMENT OF THE CASE.

(a) **The Pleadings.**—

The Complaint consisted entirely of Count Five, as amended (R. 18-19, 23). After jurisdictional averments,

it sought to predicate liability upon the averment that at the described time and place and "while the deceased, A. Bruce Stinson, was acting within the line and scope of his employment by the defendant" an employee of the defendant "so negligently operated" a train that "as a proximate result and consequence thereof" Stinson was killed. This was denied by proper plea.

(b) **The Facts as Shown by the Evidence.**[5]

Because of various omissions, and some interlarded opinion, in the statement of the evidence in the Petition, summation of the evidence and material facts is deemed necessary.

Bruce Stinson, the decedent, was engineer in the relief crew of Work Extra 1707, which was called at Montgomery, Alabama, on the night of August 6, 1951 to report to Ramer, Alabama, to assist in clearing a derailment about 2½ to 3 miles from Ramer. The crew, consisting of engineer Stinson, conductor L. B. Cloud, flagman C. C. Hays, brakeman Joe Murphy and fireman C. C. Cook, reported to Ramer, received the usual work train orders, took over Work Extra 1707 and arrived at the scene of the derailment at about 9:45 P. M. (R. 120).

In going to the derailment from Ramer the derrick wrecker and wrecker tank were in front and being pushed

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[5] While, as stated under "Questions Presented," supra, no questions on the ultimate merits of the cause are not appropriate to be considered under the Rules (par. [1] of Rule 24 and Rule 41) and Respondent is not in position to and does not undertake herein to deal with any such issues on the merits as may hereafter appear if the Court should assume jurisdiction and the record is established and available (Rules 26 and 36). Respondent is unwilling to appear to acquiesce in the "Statement of the Facts" as contained in the Petition. By setting out this summation Respondent does not undertake here to deal with any possible ultimate questions on the merits.

by the engine; next behind the engine were several gondola cars and flat cars with various contents, and at the rear of the train were three "camp cars" including a kitchen car, and on the rear was a caboose.

The train was stopped near the derailed cars, the other cars were cut off behind the engine and it moved the wrecker three or four car lengths closer to the derailed cars and "spotted" it for work (R. 123). Fireman Cook, with Stinson's permission, got off the engine to "look around" a little (R. 171). In a little while fireman Cook came back to his engine and found Stinson had left it (R. 171, 175) and fireman Cook took up the engineer Stinson's position (R. 171) upon instructions left by Stinson for Cook with McLain, the fireman of the other wrecker assisting in the re-railing (R. 175). These instructions from Stinson to the fireman Cook were to "look out for the engine" (R. 176) and "to assume the duties of the engineer" while Stinson was gone (R. 189), which, under the practices and experience of Stinson and Cook, and other engineers, meant for Cook to operate the engine as needed (R. 184) including making the trip back to Ramer to switch out the derailed car after it was picked up (R. 185, 178-179).

Fireman Cook was required to obey instructions of the engineer (R. 141, 187).

After re-railing the car, which was at 10:30 P. M. as noted by the Trainmaster (R. 125); Fireman Cook, so acting as Engineer in keeping with Stinson's instructions, moved the engine and wrecker back from the car to align the boom (R. 132), then made a coupling with the re-railed car and then, under supervision of the conductor, recoupled the engine to the remainder of the train preparatory to switching out the re-railed car by backing up to the Ramer siding (R. 132). Just before so recoupling

to the train he blew a regular "back up" signal (R. 180). Conductor Cloud then walked beside the train to the caboose on the far end of the train, nearest to Ramer, and after getting on the rear platform gave a signal to move on back to Ramer (R. 181).

It was usual and customary for the fireman of such work trains to operate the engine in such re-railing and back-up movements to switch out cars (R. 133-134) and in the switching move to Ramer the fireman ran the engine in an efficient, ordinary and careful manner.

The evidence shows without dispute that the fireman's handling the engine on this move to switch out the re-railed car in the absence of the engineer was so usual and ordinary that there was no occasion or reason for the fireman to look for Stinson or to undertake to find out where he was (R. 178-179, 133-134).

When the Work Extra 1707 reached Ramer, conductor Cloud was advised that Stinson was not on the engine and searched the "camp cars" for him (R. 125) and found no trace of him (R. 125, 127) nor any indication that anything had happened to Stinson. The train then proceeded on back to the derailment.

With the train back at the derailment and about 11:30 p. m., with Stinson's absence being known, an intensive search was made of the area, the train, the right-of-way, and the tracks for a considerable distance to the rear of the train toward Ramer (R. 97-101, 116) and no trace of Stinson was found nor any indication that anything might have happened to him.

It was found, however, that **Stinson had been in the dining car, where he ate something, but had left the dining car ten to fifteen minutes before the back-up movement to Ramer** had started (R. 114-115). The cars were standing

still at that time. Stinson did not return to his post of duty on the engine and was not seen alive again after he left the diner.

About 1:30 A. M., the engineer of passing train No. 216, being alerted to look for Stinson, discovered his nude body nearly a mile from the derailment (R. 203-204) and toward Ramer.

Stinson's body was entirely nude, except for his socks (R. 200) and all his clothes were in "a wad—wadded up" about 150 feet from the body (R. 200). Stinson's body was severed about the chest athwart the north rail. There was no evidence of any other marks, injuries or abrasions on Stinson's body. In the 150-foot space between the ball of clothes and Stinson's body, **but nowhere else**, there was blood along the track and markings as if something had been dragged (R. 205-206). No markings were found in the vicinity where the train was when Stinson left the diner nor on the approximate three-quarters of a mile to where his clothes were found "wadded up."

There was no evidence, however, as to how the engineer got from the standing diner, the place where he was last seen alive, to this spot over three-fourths of a mile away. There was no evidence as to what he was doing or had been doing in the meantime. There was no evidence how or why he came to be nude. He was not seen on, about or in the vicinity of the train or work scene at any time after he left the standing diner 10 to 15 minutes before the train was backed. There was no evidence that he was alive on the track at the time any train movement approached and passed the point where his body was found.

Thereafter, intensive inspection of Work Extra 1707 at Sprague (the opposite direction from Ramer) disclosed blood and human flesh on the wheels of a car about in the middle of the train (R. 106) beginning principally with the

car's lead wheel towards Ramer on the north side (R. 108) and on toward the engine. There was no blood on the wheels of the caboose or the "three camp cars" next to it (R. 108-146).

The following additional operating rules of Respondent were introduced in evidence (R. 139-142):

As to Engineers (Enginemen)—**Rule 972**:

"They must not leave their engine during a trip except in cases of necessity, **and then the fireman or some other competent person must be left in charge of the engine.**" (Emphasis supplied.)

Rule 973:

"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen—**Rule 990**:

"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power.

"They must comply with instructions of the Road Foreman of Engines and other Mechanical Department Officers.

"**They must comply with instructions of the engineman** (engineer) **while on duty.**

"At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman." (Emphasis supplied.)

and (R. 195):

"30. The engine bell must be rung when an engine is about to move **except in instances where the stop**

and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and passing public crossings at grade, while passing through yards and stations, when passing trains on an adjacent track, and when necessary to prevent accidents."

and (R. 295):

"32. The unnecessary use of the horn, whistle or bell is prohibited."

ARGUMENT.

I. The Petition Should Be Dismissed for Material Misrepresentations and Misstatements.

Inherent in the processes of this Court is the requirement of forthrightness in efforts of litigants to evoke its discretionary jurisdiction.

A major basis for the requested review by this Court are unctuous representations that the Supreme Court of Alabama and its Clerk connived at falsifying its records [Petition, ps. 2, 8 (last sentence), 12 to 21] by material and surreptitious alterations of that Court's official opinion. The official docket entries of action by the Supreme Court of Alabama (Appendix, p. 29), which Petitioner neglected to file with their Court, show these representations to be wholly without foundation. They further show that the action complained of (insertion by the Court the phrase "in whole or in part" at additional places in the withdrawn original manuscript opinion of March 31, 1955) **was in response to Petitioner's own objection on application for rehearing** (Petition, p. 20-21). The entry of August 21, 1957 [Appendix, p. 31] indicates that Petitioner chose the portions of the record desired for filing with this Court.

The alleged facts stated in the Petition, in this respect, are refuted by the record. That is, except as to such knowledge as Petitioner's Counsel may have had. Of this we cannot say. It is possible that counsel did not trouble to read the Court's opinion or to read the record when choosing those portions he desired to file with this Court in an effort to evoke its action.

However, we take it that signing and filing Petition and record warrants that the official records concerned furnish

good support for the facts and issues alleged and urged as a basis for exercise of the jurisdiction and processes of this Court.

Respondent respectfully submits that because of such misrepresentations and also the clear failure "to present with accuracy" the essential facts (par. 14 of Rule 23) the Petition should be dismissed or denied.

II. The Petition Is Not Timely to Raise or to Invoke the Statutory Jurisdiction of This Court.

Upon basis of the facts and circumstances disclosed, the Petition is not timely.

The Petition, filed September 9, 1957, is formally directed to attempted review of the judgment of the Supreme Court of Alabama, dated June 20, 1957, its case No. 106 (Petition, p. 2, and its Appendix, p. 27a), which affirmed the judgment of the trial Court in favor of Respondent (R. 23). If that judgment should be subject to review at all, it is obvious that the ultimate reach of success Petitioner could expect to obtain would be a possible reversal of judgment of the Supreme Court of Alabama affirming the judgment in favor of Respondent for further consistent proceedings —which could entail, at most, setting aside the trial court's judgment of November 13, 1956, in favor of Respondent and according to Petitioner another trial in the trial court.

But, oddly enough, it soon appears that the Petition, sliding to another tack, attempts to review **another** judgment—the judgment of the Supreme Court of Alabama entered June 21, 1956 (its case No. 736 on a prior separate appeal), annulling the previous action of the trial court and remanding the cause to the trial court. While in the record of the Supreme Court of Alabama concerning its judgment of June 20, 1957, affirming the action of the trial court, there appears no prior verdict or judgment in favor of Petitioner, because the proceedings in the trial court

showed there had previously been "a verdict" and judgment for Petitioner (R. 28), which had been annulled and set aside, and Petitioner stated that the amount of the annulled verdict was $46,600 (R. 30). Petitioner now wants a judgment for that amount entered here.

A bootstrap effort at recovery by ipse dixit.

But, more important, the Petition clearly shows that, for purposes of jurisdiction of this Court on review, under the applicable statutes and decisions, the judgment of reversal entered by the Supreme Court of Alabama on June 21, 1956, was a final judgment, effectively and finally determined Petitioner's asserted federal rights under the established facts and no review is now within the statutory jurisdiction of this Court [28 U. S. C., Sec. 1257 (3); 28 U. S. C., Sec. 2101 (c)].

Of the effect of the status of affairs obtaining after entry of the judgment of reversal entered June 21, 1956, the Record shows (R. 29) that Petitioner was

> "unable to produce any testimony or evidence different from or in addition to the testimony and evidence produced, offered and admitted at the said trial of June 8, 1953, to June 12, 1953."

The Petition (Petition, p. 4) further establishes that thereupon Petitioner

> "* * * had only a new trial **with no additional evidence** to offer. Petitioner returned to Jefferson County in November, 1956, and offered the previous record in evidence. **The trial court, in obedience to the previous mandate of its Supreme Court, directed a verdict for respondents.**" (Emphasis added.)

And further (Petition, p. 28):

> "**Petitioner, therefore, found herself in the intolerable situation of having no additional evidence and having to go through the artificiality of a new trial**

> **on precisely the same evidence, suffering a directed verdict and then taking an appeal, the result of which was a foregone conclusion.''** (Emphasis added.)

The question of finality is determined by this Court under the facts and circumstances before it, irrespective of characterizations in state practice, the views of state courts or the opinions of the parties. In Pope v. Atlantic Coast Line Railroad Company, 345 U. S. 379, 97 L. ed. 1094, this Court aptly held:

> ''Yet we are not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment.' We have not interpreted Section 1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of Section 1257.
>
> ''The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. **Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more.** If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question: 'there is nothing more to be decided.' Under these particular circumstances, we have jurisdiction over the cause. Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 91 L. ed. 80, 67 S. Ct. 156 (1946).'' (Emphasis added.)

And again in Richfield Oil Corp. v. State Board (Calif.), 329 U. S. 69, 91 L. ed. 80 (87), this Court held:

"The designation given the judgment by state practice is not controlling. Department of Banking v. Pink, 317 U. S. 264, 268, 87 L. ed. 254, 257, 63 S. Ct. 233. The question is whether it can be said that 'there is nothing more to be decided' (Clark v. Williard, 292 U. S. 112, 118, 78 L. ed. 1160, 1164, 54 S. Ct. 615), that there has been 'an effective determination of the litigation.' Market Street R. Co. v. Railroad Commission, 324 U. S. 548, 551, 89 L. ed. 1171, 1175, 65 S. Ct. 770; see Radio Station WOW v. Johnson, 326 U. S. 120, 123, 124, 89 L. ed. 2092, 2096, 2097, 65 S. Ct. 1475."

And further regarding elements and determination of "finality," in Market Street Railway Company v. Railroad Commission of the State of California, 324 U. S. 548, 89 L. ed. 1171, the Court held:

"We have held that finality of a judgment of a state court for determining the time within which our jurisdiction to review may be invoked is not controlled by the designation applied in state practice. Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254, 63 S. Ct. 233; Cole v. Violette, 319 U. S. 581, 87 L. ed. 1599, 63 S. Ct. 1204. The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character."

The situation is analogous to the attempt made in Rio Grande Western Railway Company v. Stringham, 239 U. S. 44, 60 L. ed. 136, where on certiorari directed to a **second judgment** of the Utah Supreme Court, affirming the trial court's entry of judgment in keeping with an earlier reversal, an attempt was made to review the **first judgment** of the Utah court which reversed the trial court, this Court held:

"Manifestly the first judgment was final within the meaning of Judicial Code, Section 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, Section 1214). It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court: Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 709; Chesapeake & P. Telep. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881. And as the question sought to be presented arises upon the first judgment—it being final in the sense of Section 237—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here."

Attention is also invited to Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254, and the following observations there made:

"For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Ct., 278 U. S. 575, 73 L. ed. 515, 49 S. Ct. 94; Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission, No. 160, decided October 12, 1942, 317 U. S. 588, post 482, 63 S. Ct. 38), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights, and that that adjudication is not subject to further review by a state court. (See Gorman v. Washington University, 316 U. S. 98, 86 L. ed. 1300, 62 S. Ct. 962.) Where the order or judgment is final in this sense the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

It thus clearly appears from the record facts and statements and concessions freely made by Petitioner that, after entry of the judgment of the Supreme Court of Alabama on June 21, 1956, there were no other facts, evidence or claims to present to any court, that such rights as she claimed under the F. E. L. A. were fully determined by it and nothing remained save the formality of entry of judgment in the trial court in conformity with it. That judgment is therefore shown to have been "final" within the orbit of review by this Court and was subject to review, if at all, upon a petition filed within ninety days from June 21, 1956, but not otherwise (28 U. S. C., sec. 1257).

Here compare Cole v. Violette et al., 319 U. S. 581, 87 L. ed. 1599 (1600), where the Court held:

> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript, as the 'final decree' in the case. See Boston v. Santosuosso, 308 Mass. 189, 194, 31 N. E. (2d) 564; Carilli v. Hersey, 303 Mass. 82, 84, 20 N. E. (2d) 492. But in determining what is a final judgment or decree within the meaning of par. 237 of the Judicial Code, 28 USCA, par. 344, 8 FCA, title 28, par. 344, we are not controlled by the designation applied to it in state practice. Department of Banking v. Pink, 317 U. S. 264, 268, ante, 254, 257, 63 S. Ct. 233. Gorman v. Washington University, 316 U. S. 98, 101, 86 L. ed. 1300, 1302, 62 S. Ct. 962. The order of the Supreme Judicial Court of Massachusetts incorporated in its rescript, was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial court. The appeal is dismissed on the ground that it was

not applied for within the time provided by law. Department of Banking v. Pink, supra, and Matton S. B. Co. v. Murphy, 319 U. S. 412, ante, 1483, 63 S. Ct. 1126, supra."

In any event, the judgment of the Supreme Court of Alabama entered June 21, 1956 (Appendix, p. 29, docket entry), on the first appeal annulling the judgment of the trial court passed out of the power and jurisdiction of the Supreme Court of Alabama upon entry or, at most, after 15 days. Rule 34, "Rules of Practice", Alabama Supreme Court, Sec. 13, Title 17, Code of Alabama 1940. No question regarding that judgment appears in the instant record concerning the judgment of the trial court in favor of Respondent and its affirmance June 20, 1957, or was passed upon by the Supreme Court of Alabama.

That judgment of June 21, 1956, setting aside and annulling the judgment of the trial court is not, and cannot now be brought, within the jurisdiction of this Court.

The denial of certiorari in Davis, Admx., v. Alabama Great Southern Railroad Co., 324 U. S. 846, 89 L. ed. 1407, is clearly wholly inapposite here. There, it was not established as it is here that upon rendition of the judgment and opinion in question Petitioner was unable to produce any other, different or additional evidence on any further trial, could only go through the artificial formality of offering the identical record of evidence in the trial court with the foregone conclusion that the trial court could only apply the mandate of the judgment in question and enter a judgment against Petitioner and in favor of Respondent —and that thus the judgment in question (June 21, 1956) was a full, definitive and conclusive determination of any right claimed by Petitioner under the Act.

It is clear that **neither** judgment of the Supreme Court of Alabama is now within the jurisdiction of this Court.

III. The Petition Is Insufficient to Evoke Exercise of Any Discretionary Jurisdiction of This Court.

Having "shopped around"—in the United States District Courts at Jacksonville, Florida, and the Middle District of Alabama—Petitioner finally selected the courts of the State of Alabama to try her claim. Petitioner was accorded full, fair and painstaking hearings, in applying to her claim the correct rules of law under the FELA as long recognized by the Alabama Supreme Court (Reynolds v. Atlantic Coast Line Railroad Company, 251 Ala. 27, 36 So. 2d 102), **as expressly affirmed by this Court** (Reynolds v. Atlantic Coast Line Railroad Company, 336 U. S. 207, 93 L. ed. 618).

Petitioner now seeks to have this Court search the record and re-weigh the evidence really because "we didn't win." So unsure is the Petition of its ground that a major element of the request that this Court assume jurisdiction is false representation that the Supreme Court of Alabama slyly connived at Petitioner's undoing (Petition, pp. 2, 3, 8, and 12 to 21).

In addition to those already stated, other fundamental reasons why this Court should not, in the circumstances and posture of this case, grant the requested writ and undertake this review are cogently set out in the separate opinion of Mr. Justice Frankfurter in Rogers v. Missouri Pacific, 352 U. S. ...., 1 L. ed. 2d 520, 77 S. Ct. ..... We adopt by reference the statement of principles and authorities set forth in that opinion concerning the grant of writs of certiorari under the applicable statute and Rules of this Court. We shall not extend this reply by repeating the considerations there lucidly presented.

The profession has been taught to believe that the object and purpose of the discretionary review by this court of decisions of lower appellate courts, state and federal, in matters involving rights or issues under the Constitution

and laws of the United States is to achieve a uniformity and harmony in **recognition and interpretation of law**—not uniform and identical **results** in lawsuits. We have been taught that the facts, as such, in any particular case are of "no doctrinal importance." Yet in cases under the Federal Employers' Liability Act there appears to be a widespread notion that the desired "uniformity" is of **result**—and is to be equated with recovery by the employee.

But if we are not to substitute largess for law, it must be conceded that there **are** some cases in which the facts cannot, after allowing all intendments and despite whatever human sympathies may be evoked, which cannot support recovery or warrant submission to a jury on the question of liability (cf. Rogers v. Missouri Pacific, supra, footnote 26, page 501 of 1 L. ed.). As aptly put in the separate opinion of Mr. Justice Harlan in Rogers v. Missouri Pacific, supra (at page 519 of 1 L. ed. 2d):

> "No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. Moore v. Chesapeake & O. R. Co., 340 U. S. 573, 95 L. ed. 547, 71 S. Ct. 428. And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts."

If this Court is saddled with the necessity, or committed to the course, of combing the minutiae of record facts,

upon any request of the plaintiff, to "make the last guess", and to substitute its appraisal for that of the Court below concerning submission to the jury—then it must be a two-way street. If we are not to substitute largess for law then the **Defendant** in such cases must have the same correlative right under the same statute to invoke the same consideration on a conscientious claim of **insufficiency** of the evidence to warrant submission to a jury. It would be a monstrous system which would deny to one party a right of process freely accorded the other.

Thus, if this Court is required, or committed to the course, of such review as appears here requested then, to accord evenhanded justice and equality of treatment to litigants, it has the task of "riding herd" on the settlement of pleadings, the findings of fact and the appraisals of evidence by the lower courts country-wide in the multitude of contested suits arising under this Act.

We respectfully submit that the statutes do not require, that the rules of this Court do not contemplate, and that the public interest of the country does not demand, such review as is here requested.

IV. **Conclusion.**

Respondent respectfully submits that the several facts, authorities and reasons set out hereinabove abundantly demonstrate that the Petition presents nothing within the statutory jurisdiction of this Court to review, and that under the facts, circumstances and condition of the cause no appropriate occasion for the exercise by the Court of any discretionary jurisdiction to review is presented.

However, respect for the Supreme Court of Alabama as well as for this Court prevents our closing this reply without notice of further imputations advanced in the Petition as "reasons" why this Court should assume jurisdiction. As such "reasons" and regarding the opinion of the Su-

preme Court of Alabama the Petition bandies about such statements and charges as "evidences hostility to the federal statute," "capricious and unreasonable," "grave emasculation," etc.

Both the records of this Court and the opinions of the Supreme Court of Alabama in this cause conclusively show that the Supreme Court of Alabama carefully and explicitly recognizes and embraces, and recognized and embraced in this cause, the fundamental and continuing doctrine of the law as declared by this Court.

In the opinion accompanying the judgment of June 20, 1957 here sought to be reviewed (Petition, p. 2), the Alabama Supreme Court expressly adopted [p. 306 of 96 So. (2d)] its earlier definitive opinion [264 Ala. 522, 88 So. (2d) 189] wherein the governing principles prescribed by this Court were embraced and expressed as follows [p. 192 of 88 So. (2d)]:

> "Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which in whole or in part proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged and the causal relation between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury." (Citing leading decisions of this Court.)

And further in that opinion, in summation of the principles so embraced, the Court again referred to and quoted from its opinion in Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27, 36 So. (2d) 102 (affirmed 336 U. S. 207, 93 L. ed. 618), quoting as follows [p. 194 of 88 So. (2d)]:

> "A party claiming under the act must in some adequate way establish negligence, and it must appear

that such negligence was the proximate cause, in whole or in part, of the accident. * * *."

In its earlier opinion in Reynolds v. Atlantic Coast Line Railroad Co., supra, the Alabama Court had thus stated and embraced the doctrines laid down by this Court [p. 104 of 36 So. (2d)].

> "The case of course is governed by the federal decisions, and as we have recently said in the case of Atlanta, Birmingham and Coast R. R. Co. v. Cary, Ala. Sup., 35 So. 2d 559, 560: 'Under these decisions the Federal Employers' Liability Act does not make the employer the insurer of the safety of the employee while on duty. And the basis of liability is the negligence of the employer, not the fact that injuries occur. Negligence must be "in whole or in part" the cause of the injury.'
>
> "A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident." (Citing leading decisions of this Court.)

In its affirmance of the Alabama Court's decision in the Reynolds case, supra, this Court said (p. 620 of 93 L. ed.):

> "The Alabama Supreme Court conceded that the complaint adequately charged negligence in the failure to remove the canes and in the failure to provide a competent fellow servant. It held, however, that the facts alleged did not show that the accident resulted, in whole or in part, from that negligence. We cannot say that the Supreme Court of Alabama erred."

Thus, both the records of this Court and the opinions of the Supreme Court of Alabama in this cause conclu-

sively demonstrate that the Supreme Court of Alabama has long and consistently recognized and embraced the fundamental and continuing doctrine of the law as declared by this Court in Tennant v. Peoria and Pekin Union Railroad Company, 321 U. S. 29, 88 L. ed. 520, as follows:

> "In order to recover under the Federal Employers Liability Act it was **incumbent upon Petitioner to prove** that Respondent was negligent **and that such negligence was the proximate cause in whole or in part of the fatal accident.**
>
> "Petitioner was required to present **probative facts from which the negligence and the causal relation could be reasonably inferred.** The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." (Authorities cited.) (Emphasis added.)

The best that can be said for those indicated further imputations in the Petition is that they are misleading.

It is respectfully submitted that the Petition should be dismissed or denied.

Respectfully submitted,

PEYTON D. BIBB,
NORMAN C. SHEPARD,
Counsel for Respondent.

GRAHAM, BIBB, WINGO & FOSTER,
1115 First National Building,
Birmingham, Alabama,
Of Counsel.

Certificate of Service.

I, Peyton D. Bibb, one of the Attorneys for the Atlantic Coast Line Railroad Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of October, 1957, I served a full, true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama, on Mildred S. Stinson, as Administratrix, etc., Petitioner, by mailing, air mail, such copy in a duly addressed envelope with first class Air Mail postage prepaid, to her Attorney of Record, Joseph S. Lord III, Esq., addressed as follows:

Joseph S. Lord, III, Esq.,
Attorney for Mildred S. Stinson as Administratrix
of the Estate of A. Bruce Stinson,
Broad and Sansom Streets,
Philadelphia 7, Pennsylvania

and duly deposited the same in a United States Post Office mail box.

Peyton D. Bibb,
1115 First National Building,
Birmingham, Alabama,
Attorney for Atlantic Coast
Line Railroad Company,
Respondent.

PAGE 44 OF DOCKET 107.

[SEE DOCKET 108, PAGE NUMBER 198, 6 Div. 106, FOR SECOND APPEAL]

DIV. NO. 11

[88 So. 2d 189]

WILLIAM ROBBY, JR.

Peyton D. Bibb - - -
Graham, Bibb, Wingo
and Foster
First National Bldg
B'ham, Alabama

6 Cys 11-20-54(Printed)
4 Cys 1-10-55(reply) - -
4 Cys 4/28/55(reply to rng)
5 Cys Letter 8/5/55

(4 Cys Letter in response to
Lord's letter of April 16,
filed 4/23/56/(on rng)(PD-Bibb)

ATLANTIC COAST LINE RAILROAD COMPANY

vs

MILDRED S. STINSON, AS ADMINISTRATRIX
OF THE ESTATE OF A. BRUCE STINSON, DECEASED.

G. Ernest Jones, Jr.
Beddow and Jones
Joseph S. Lord, III (Letter Dec.3 correcting
Richter, Lord and Parage page 8 of brf.)
(Philadelphia, Penn.)-6 Cys 12/3/54
121 South Broad St. Building (Broad and Sansom Streets)(4 Cys Let. 12-7-54)

7 Cys 4/14/55(On rng) (4 Cys Letter from Lord, III, 4/16/56)
5 Cys 5/11/55 (reply) Photostatic cy Op.U.S. attached)
JEFFERSON CIRCUIT COURT - NO. 27471-X
(Thomas E. Huey, Jr.) STAKELY, J

APRIL 14, 1954	CERTIFICATE FILED
APRIL 20, 1954	CONTINUED
NOVEMBER 16, 1954	TRANSCRIPT FILED
NOVEMBER 16, 1954 -	SPECIAL CERTIFICATE OF CLERK ACCOMPANYING EXHIBITS, VIZ.: Deft's Ex. 1: Plaintiff's Exs. 3, 4: Deft's Ex. 2: Deft's Ex. 3: Deft's Ex. 4: Deft's Ex. 5
NOVEMBER 23, 1954	ARGUED AND SUBMITTED-(Livingston, C. J., Lawson, Stakely, and Merrill, JJ.)
MARCH 31, 1955	REVERSED AND REMANDED
MARCH 31, 1955	CERTIFICATE AND OPINION ISSUED

APRIL 14, 1954	CERTIFICATE FILED
APRIL 20, 1954	CONTINUED
NOVEMBER 16, 1954	TRANSCRIPT FILED
NOVEMBER 16, 1954 -	SPECIAL CERTIFICATE OF CLERK ACCOMPANYING EXHIBITS, VIZ.: Deft's Ex. 1: Plaintiff's Exs. 3, 4: Deft's Ex. 2: Deft's Ex. 3: Deft's Ex. 4: Deft's Ex. 5
NOVEMBER 23, 1954	ARGUED AND SUBMITTED-(Livingston, C. J., Lawson, Stakely, and Merrill, JJ.)
MARCH 31, 1955	REVERSED AND REMANDED
MARCH 31, 1955	CERTIFICATE AND OPINION ISSUED

APRIL 14, 1955	APPLICATION FOR REHEARING FILED BY APPELLEE
APRIL 14, 1955	CERTIFICATE OF RECALL ISSUED, ORDER, STAKELY, J.
APRIL 20, 1955	CERTIFICATE AND OPINION RETURNED PURSUANT TO RECALL
JULY 30, 1955	LETTER (July 28, 1955) FROM JOSEPH S. LORD, III, CONTAINING CITATION OF SOUTHERN RWY CO V. NERSE, 216 F. (2d) 772 (C.A. 4th, 1954) TRANSMITTED TO JUSTICES WHO CONCURRED IN ORIGINAL OPINION
AUGUST 5, 1955 -	LETTER (Aug. 4) FROM PEYTON D. BIBB IN RESPONSE TO LETTER OF JOSEPH S. LORD, III, FILED
APRIL 16, 1956 -	FOUR COPIES LETTER FROM JOSEPH S. LORD, III WITH PHOTOSTATIC COPY U. S. DECISION SCHULZ, ADMRX. V. PENNSYLVANIA RAILROAD CO. FILED ON REHEARING
APRIL 23, 1956 - - -	LETTER FROM PEYTON BIBB IN RESPONSE TO LORD'S LETTER OF APRIL 16, 1956, RECEIVED, FILED, DISTRIBUTED
JUNE 21, 19 - - -	APPLICATION FOR REHEARING OVERRULED: NO OPINION WRITTEN (Pages 7, 8, 10 and 11 rewritten to insert "in whole or in part")
JUNE 21, 1956 - -	CERTIFICATE OF REVERSAL AND COPY OF OPINION RETURNED TO CLERK

(OVER)

JANUARY 24, 1957 - ---	EXHIBITS FILED ON NOVEMBER 16, 1956, returned to MR. JULIAN SCHUPT, CLERK JEFFERSON CIRCUIT COURT, AT REQUEST OF O. ERNEST JONES, ON AUTHORITY OF STANLEY, J. (REGISTERED MAIL: RETURN RECEIPT REQUESTED)
AUGUST 21, 1957	PREPARATION OF RECORD TO ACCOMPANY RECORD IN 6 DIV. 106 ON APPEAL TO SUPREME COURT OF THE UNITED STATES. PORTION OF CERTIFIED COPY OF RECORD FURNISHED BY JOSEPH LORD, III: PORTION OF RECORD PHOTOSTATED BY BLUE PRINT SERVICE. ONLY PHOTOSTATED PAGES CHARGED FOR. $38.00 RECORD SENT TO MR. JOSEPH S. LORD, III., PHILADELPHIA, PENN. VIA REGISTERED MAIL, RETURN RECEIPT REQUESTED.
AUGUST 29, 1957 -	CHECK FOR $38.00 made payable to Blueprint Service Company. Provident Tradesmens Bank and Trust Company, Philadelphia, Pa., received from Richter, Lord and Levy for copy of record prepared for U.S. Supreme Court. Sent to Blueprint Service Company.

STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1955-56

6th Div. No. 736

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

v.

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, Appellee

From JEFFERSON CIRCUIT NO. 27471-X Court.

The State of Alabama,
City and County of Montgomery

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to two inclusive, contain a full, true, and correct copy of the Sheet Numbered 44 from Docket 197, October Term 1955-56, showing the entries made and entered in the above styled cause, particularly the entry made and entered on June 21, 1956, "Application for rehearing

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

v.

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, Appellee

From JEFFERSON CIRCUIT NO. 27471-X Court

The State of Alabama,
City and County of Montgomery

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to two inclusive, contain a full, true, and correct copy of the Sheet Numbered 44 from Docket 197, October Term 1955-56, showing the entries made and entered in the above styled cause, particularly the entry made and entered on June 21, 1956, "Application for rehearing
overruled: No opinion written [Pages 7,8,10 and 11 rewritten to insert 'in whole or in part'"], by said Supreme Court, as the same appears and remains of record and on file in this office.

~~Witness~~ J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 11th day of SEPTEMBER 19 57.

J. Render Thomas
Clerk of the Supreme Court of Alabama

OPINION ON FIRST APPEAL.

(October Term, 1955-56,
6th Div. No. 736.)

ATLANTIC COAST LINE RAILROAD CO.

v.

MILDRED S. STINSON, as Adm'x.

6 Div. 736.

Supreme Court of Alabama.

March 31, 1955.

Rehearing Denied June 21, 1956.

264 Ala. 522, 88 So. 2d 189.

Stakely, Justice.

This is an action instituted against the Atlantic Coast Line Railroad Company under the Federal Employers' Liability Act, 45 U. S. C. A., § 51 et seq., by Mildred S. Stinson, as administratrix of the estate of A. Bruce Stinson, deceased, to recover damages for his death. Liability is predicated upon the alleged negligence of the defendant in the operation of its railroad which allegedly caused the death of the deceased, while in its employment. Upon the trial there was a verdict for the plaintiff and a judgment rendered thereon. Motion for a new trial was overruled and hence this appeal.

As submitted to the jury the complaint as last amended consisted only of count 5. In substance it alleged that A. Bruce Stinson was an employee of the defendant railroad and was killed while acting within the line and scope of his employment and that the defendant railroad was engaged in interstate commerce at the time of the death of decedent. It was further alleged that the death of Stinson resulted from the negligence of one or more of the officers, agents or employees of the defendant, whose name and names are

unknown to the plaintiff, while acting within the line and scope of their employment in this to wit: that he or they so negligently operated the aforesaid railroad train of the defendant as to cause plaintiff's intestate to be run over, upon or against by the said railroad train and as a proximate result and consequence thereof plaintiff's intestate was killed.

The defendant filed a plea of the general issue in short by consent with leave to give in evidence any matter which would be admissible in evidence if well pleaded and with leave to the plaintiff to make like reply.

The proof shows that on August 6, 1951, the crew of Work Extra 1707 consisting of conductor L. B. Cloud, flagman C. C. Hayes, brakeman Joe Murphy, fireman W. F. Cook and engineer A. B. Stinson was called to duty at Montgomery, Alabama, to report to Ramer, Alabama, to handle a wrecker for a train that had been derailed. When Work Extra 1707 arrived at Ramer they took over the work train, received the usual work train orders and proceeded to the place of the derailment, which was between 2½ and 3 miles beyond Ramer. They arrived at the scene of the derailment at about 9:45 p. m. At this time Work Extra 1707 was made up of the following cars from the front to the rear:

1. Wrecker
2. Wrecker tank
3. Engine
4. Gondola car of ties
5. Gondola car of coal
6. Flat car or wheel car
7. Bunk car
8. Kitchen car
9. Living and dining car
10. Caboose.

Upon arrival at the scene of the derailment all cars were cut from the engine except the wrecker cars. The engine and the wrecker cars were then moved forward by Stinson, the engineer, about four car lengths, nearer the derailment and "spotted." After the engine of Work Extra 1707 had been "spotted" by Stinson as aforesaid, its fireman Wm. F. Cook, upon receiving permission from Stinson, left the engine to go to the wreck and "to look around."

At 10:15 another train, the Western Wrecker, consisting of a total of five cars, arrived at the western end of the derailed cars. On this train was a fireman named McClain.

When fireman Cook returned to Work Extra 1707 fireman McClain of the Western Wrecker was in the engine cab of Work Extra 1707 but Stinson was not. McClain told Cook that Stinson had been on the engine when he reached it and had asked him (McClain) to look out for the engine "until Stinson or Cook returned."

There was proof that after Stinson had left his engine he went to the kitchen car of 1707 and ate a plate of food given him by the cook. He left the dining car, leaving his cap on a stool. Stinson did not return to his engine. He was never seen alive after having left the dining car. There was proof that at the time Stinson left the dining car the cars were standing still and they were not moved, according to conductor Cloud, until it was "right at 10:30." Other testimony shows that after rerailing the wrecked car there was a coupling movement to the rerailed car, a lowering of the boom on the wrecker; a coupling to the rest of the train and then that conductor Cloud, who watched this operation, walked back to the caboose at the rear of the train before the move actually started on his signal given from the rear end of the caboose.

Stinson was not found until about two or three hours later after he left the diner with W. C. Stripling, the engi-

neer of Through Train 216, going towards Ramer after the track had been cleared, discovered Stinson's nude body severed across the north rail of the track at a point something over three-fourths of a mile from where he had last been seen at the diner. The lower part of Stinson's body was between the rails with the feet angling down the hill toward the west. The upper part was outside the rail with the head turned downhill. The arms were pulled back to the shoulders, the hands were gripped and the body was naked except for the socks. His clothes were found "wadded up" about 150 feet from the body toward the derailment. There was evidence of blood on the tracks and scuff marks to indicate he was dragged the 150 feet from the clothes to where the body was found.

There was proof showing that fireman Cook in Stinson's absence in operating the engine made three separate back-up moves. First, after coupling to the rerailed hopper, he moved back two car lengths and stopped so that the boom of the wrecking derrick could be swung; second, he moved back the remaining two car lengths, separating the engine from the cut cars in order to couple; third, he moved back two and one-half to three miles to Ramer. This last move was made without incident at about ten miles per hour, the caboose being in the lead.

When the absence of Stinson was noted the train was inspected at Sprague, which is a place on the railroad between Ramer and Montgomery. A lot of blood was found on the northeast wheel of the wheel car and a small amount of blood on the wheel next to it. Blood was also found on the body bolsters and truck bolsters of the same car. Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car. So far as we can discover there is nothing in the record to

show that any portion of the clothing of the deceased or any shred thereof, was found beneath the wheel car or under any other part of the train.

The proof showed rules of the Atlantic Coast Line Railroad Company as follows:

As to Engineers (Enginemen)—Rule 972: "They must not leave their engines during a trip except in cases of necessity, and then the fireman or some other competent person must be left in charge of the engine."

Rule 973:—"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen. Rule 990:—"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power. They must comply with instructions of the Road Foreman of Engines and other Mechanical Department Officers. They must comply with instructions of the engineman (engineer) while on duty. At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman."

Rule 994:—"They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. They must not run an engine in the absence of the engineman unless, in an emergency, they are directed to do so by the conductor or some other person in authority."

In addition to the rules pertaining to the fireman and engineer, the following rules were shown:

"Rule 20:—The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and passing public crossings at grade, while passing trains on an adjacent track, and when necessary to prevent accidents."

Rule 33:—"The unnecessary use of the horn, whistle or bell is prohibited."

Rule 108:—"In case of doubt or uncertainty, the safe course must be taken."

The fundamental question in the case is whether the court erred in refusing the affirmative charge requested in writing by the defendant.

In reviewing the court's refusal to give the affirmative charge in Atlantic Coast Line R. Co. v. McMoy, 261 Ala. 66, 73 So. 2d 85, 90, this court said:

> "Error is predicated on the refusal of the court to give the general affirmative charge with hypothesis. It is well understood that actionable negligence may be established by circumstantial evidence. Atlantic Coast Line R. Co. v. Taylor [260 Ala. 401], 71 So. 2d 27; Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So. 2d 726; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. Furthermore, where the affirmative charge was refused the defendant, the entire evidence must be viewed in its most favorable aspect to the plaintiff and where this is done and a reasonable inference may be drawn adverse to the party requesting the affirmative charge, such charge is properly refused. Atlantic Coast Line R. Co. v. Taylor, supra, and cases cited therein. * * *"

[1] Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which in whole or in part proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged and the causal relation between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury. Atlantic Coast Line Railroad Co. v. Barnes, 261 Ala. 496, 75 So. 2d 91; Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27, 36 So. 2d 102, affirmed 336 U. S. 207, 69 S. Ct. 507, 93 L. Ed. 618; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L Ed. 520; Atlantic Coast Line Railroad Co. v. McMoy, supra.

There are three cases strongly relied on by the appellee to which we wish to refer at this point. In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which in whole or in part proximately caused the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture. In Lavender v. Kurn, supra, it was shown that the decedent suffered the injuries from which he died at a place where his duties required him to be. The railroad contended that the decedent was murdered but the court held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad in whole or in part proximately caused the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause.

This court as it was its duty to do followed the reasoning in the foregoing decision of the Supreme Court of the

United States in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 239 Ala. 688, 68 So. 2d 726, and in Atlantic Coast Line Railroad Co. v. McMoy, supra, and held that since there was proof of probative facts from which the jury had a right to infer negligence of the defendant and that the decedent was killed by the railroad at a place where his duties to the railroad required him to be, the court would not speculate as to whether at the time of his death he was doing his duty or engaging in something not pertaining to his duty. We call attention to the fact that both in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line R. Co. v. McMoy, supra, the work of the decedent required him to work on the ground alongside of or between the cars of the defendant railroad.

[2, 3] As we read the present record, there appears to be a conflict in the evidence as to whether fireman Cook in running the engine abided by the rules of the company in making the movements to which we have referred, in the absence of the engineer and in his failure to ring the bell at each movement. Upon a careful consideration it is our view that the plaintiff was entitled to go to the jury on these issues, which means that there was sufficient evidence for the jury to find that there was negligence on the part of the Atlantic Coast Line Railroad Company. Violation of one of defendant's rules is evidence of negligence. Tennant v. Peoria & P. U. R. Co., supra; Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; Alabama Great Southern Railroad Co. v. Davis, 246 Ala. 64, 18 So. 2d 737.

This brings us to what we regard as the vital question in the case. Did the negligence, if any, of the defendant railroad in whole or in part proximately result in the death of Stinson?

The proof shows that Stinson's nude body was found severed across the rail of the track about three-fourths of a mile from where he had last been seen alive over two hours

before. All of his clothes except his socks which he had on were found "wadded up together" about 150 feet nearer to the place where he had last been seen alive than where his body was found. There were markings on the track indicating that something had been dragged between the place where the nude body was and the clothing. There was no evidence, however, as to how the engineer got from the diner, the place where he was last seen alive, to the above spot about three-fourths of a mile away. There was no evidence as to what he was doing and had been doing in the meantime. There was no evidence as to how he became nude. There was no evidence that he was alive and on the track at the time any train movement approached and passed the point where his body was found.

[4] Can it be said that there was any evidence which showed that Stinson's body was found at a place where his duty required him to be, as was the situation in the cases cited above? The duties of Stinson required him to be on the engine in order to operate the engine as its engineer. We consider it to be a correct principle that when a railroad provides food for its employees and they are using the facilities so provided to prepare themselves for their work or to rest and recuperate, they must be regarded as in its employ—Mostyn v. Delaware L. & W. R. Co., 2 Cir., 1947, 160 F. 2d 15, certiorari denied 1947, 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355; Virginian Ry. Co. v. Early, 4 Cir., 1942, 130 F. 2d 548; North Carolina R. Co. v. Zachary, 1914, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591.

We consider that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine. However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he

was doing when he was struck by the movement of the train. Under all the evidence there was no duty on Cook to find out where Stinson was or to anticipate peril to him. Stinson had no duties to perform in between or alongside the cars of the train, as was the situation in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line Railroad Co. v. McMoy, supra, referred to above. Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So. 2d 737.

[5] Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant in whole or in part proximately caused his death. Brady v. Southern Railway Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239; Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case this court said:

> "A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.
>
> * * * * * * *
>
> "In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." [251 Ala. 27, 36 So. 2d 104.]

We conclude that the court was in error in refusing to give the affirmative charge as requested by the defendant in the lower court.

Reversed and remanded.

Livingston, C. J., and Lawson and Merrill, JJ., concur.

OPINION ON SECOND APPEAL.

THE STATE OF ALABAMA
Judicial Department
The Supreme Court of Alabama
October Term, 1956-57

6 Div. 106

MILDRED S. STINSON, as Administrator, etc.,
v.
ATLANTIC COAST LINE RAILROAD COMPANY.

June 20, 1957.

... Ala. ..., 96 So. 2d 305.

Merrill, Justice.

This is the second appeal in this cause. On the first trial in circuit court, judgment was entered in favor of plaintiff Stinson. On appeal, this court decided that the defendant, Atlantic Coast Line Railroad Company, was entitled to the affirmative charge, and the judgment was reversed and the cause remanded. **Atlantic Coast Line Railroad Co. v. Stinson**, 264 Ala. 522, 88 So. 2d 189. Under these circumstances, there being no final judgment, it was impossible to apply to the Supreme Court of the United States for a review of the decision of this court.

When the cause again came on for trial, the parties, by stipulation, submitted the cause to the jury on the identical pleadings, testimony, evidence and rulings of the court as on the original trial. The trial court properly gave the requested written affirmative charge for the defendant and plaintiff effected this appeal.

This court continues to hold that the affirmative charge was properly given, and that the judgment of the circuit

court should be affirmed. For the sake of brevity, and to avoid the setting out of the original opinion verbatim, we hereby adopt the opinion in **Atlantic Coast Line Railroad Co. v. Stinson,** 264 Ala. 522, 88 So. 2d 189, as our opinion in the instant case.

We feel that we should correct the concurrences in our original opinion as listed in the printed reports. Upon original deliverance, Chief Justice Livingston, Justices Lawson and Merrill concurred in the opinion by Mr. Justice Stakely, as reported. On application for rehearing, Chief Justice Livingston was of the opinion that the application for rehearing ought to be granted. That necessitated the consideration of the opinion by the entire court. At that consultation, all the justices concurred except Chief Justice Livingston, who dissented. The original record shows a notation of such dissent. This explanation is included only for the sake of accuracy.

The appellee in the instant cause has filed a motion to dismiss the appeal. We have carefully considered the grounds listed in the motion and those argued in brief, and we are of the opinion that in this particular case, they are not sufficient to warrant the dismissal of the appeal. Motion overruled.

Affirmed.

All the Justices concur, except Livingston, C. J., who dissents.